IN THE

# Supreme Court of the United States

October Term, 1962

No. 34

WILLIAM DOUGLAS and BENNIE WILL MEYES,
*Petitioners,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of California.**

## PETITION FOR REHEARING.

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## PETITION FOR REHEARING.

Respondent respectfully petitions this Honorable Court for a rehearing in the above entitled matter.

## GROUNDS FOR REHEARING.

I.

### The Majority Opinion Is Conceptually Mistaken as to the True Scope of Review Afforded by the California Appellate Courts to Indigents Even Though Said Courts Decide Not to Appoint Counsel on Appeal.

It would serve no useful function here for the respondent to counterpoint the majority opinion of this Honorable Court with thoughts already expressed so cogently in the two dissenting opinions.

There is, however, one area where the majority opinion appears to be conceptually mistaken and neither dissenting opinion directly mentions this area. Respondent has particular reference to the scope of review afforded an indigent appellant by a California appellate court, where said court has examined the indigent's case in accord with *People v. Hyde*, 51 Cal. 2d 152, 331 P. 2d 42, and decided that appointment of counsel "would be of no value to either the defendant or the court."

The majority opinion of this Honorable Court states:

> "In spite of California's forward treatment of indigents, *under its present practice the type of an appeal a person is afforded in the District Court of Appeal hinges upon whether or not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel. If he cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided.* At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not requred." (Emphasis added.)

*Douglas v. California*, 31 Law Week 4281.

This language does great injustice to the actual review afforded an indigent without counsel in California's Appellate Courts. Said language indicates that the majority of this Honorable Court have concluded that the appellate justices prejudge the merits of a given case at the time they are examining the record to determine if counsel should be appointed. This Honorable Court concludes that if, in fact, the appellate court determines not to appoint counsel, then that indigent's case is not accorded the same caliber of review received by an appellant of means. These conclusions are patently unsupported by fact, as an examination of some recent California cases will reveal.

In the case of *People v. Rudolph*, 197 Cal. App. 2d 739, 17 Cal. Rptr. 603, the California District Court of Appeal refused to appoint counsel, and appellant never filed a brief of any sort. However, not only did the appellate court refrain from a routine affirmance in an aura of prejudgment from the denial of counsel, they, in fact, closely analyzed the case on appeal and reversed the lower court's conviction of appellant on a serious count of robbery. Said opinion is attached to this petition as Exhibit "A" and dramatically demonstrates the appellate court's avoidance of a *pro forma* review of an appeal by an indigent where said court has decided counsel would be of no help to the court or defendant.

In the case of *People v. Bryson*, 172 Cal. App. 2d 536, 342 P. 2d 274, the California District Court of Appeal referred a case to an *attorney* member of the Committee on Criminal Appeals of the Los Angeles Bar Association. Said *attorney* reported to the court

"that no meritorious ground of appeal had been found." The appellate court thereafter refused to appoint counsel, after examining the record, and appellant never filed a brief. However, the appellate court went on to *reverse* the judgment because the prosecution had not adequately proved appellant's prior convictions.

Again, in the case of *People v. Parra*, 193 Cal. App. 2d 93, 13 Cal. Rptr. 828, the California District Court of Appeal reversed a conviction of appellant after refusing to appoint a counsel for him.

In the case of *People v. Mulvey*, 196 Cal. App. 2d 714, 16 Cal. Rptr. 821, the California District Court of Appeal *appointed a counsel* for the indigent appellant and said counsel furnished the court "with a comprehensive report and analysis of the evidence and other trial proceedings, including the instructions, *which concludes with the statement that in his opinion there is no basis for the appeal.*" (Emphasis added; 196 Cal. App. 2d 714, 716-717.) Appellant later filed his own brief, the judgment was affirmed and then *on their own motion*, the court granted a rehearing, reanalyzed the case, and reversed the conviction in its entirety.

In the case of *People v. Hamm*, 145 Cal. App. 2d 242, 302 P. 2d 345, the California District Court of Appeal again referred the case to an attorney member of the Los Angeles Bar Association Committee on Criminal Appeals. Said attorney found that "no meritorious ground for appeal existed and that the filing

of a brief would be unjustified." (145 Cal. App. 2d 242, 244.) The indigent appellant filed no brief, but the court, after an "independent study of the record" reversed the lower court's adjudication that defendant had suffered a prior conviction. The evidence was found lacking in this respect by our appellate court, although said error was overlooked by an experienced attorney. [See Ex. "B".]

Thus, it is submitted that in California, the appellate courts judiciously protect the rights of an indigent appellant, and yet the procedure laid down in *People v. Hyde, supra*, 51 Cal. 2d 152, 331 P. 2d 42, also affords the court an opportunity to avoid unnecessary expenditures in time and funds on frivolous appeals. (Respondent has been informed by the Clerk of the Second District Court of Appeal, the busiest Appellate District in the state of California, handling approximately 700 criminal appeals a year, that over 50% of all criminal appeals are by indigents.)

The above cases clearly demonstrate that the California reviewing courts do not prejudge a particular case at the time they decide on the feasibility of appointing counsel. These cases show that even where a case has been referred to an experienced attorney, and he has missed an obvious point of merit, the California appellate courts have found said error and corrected it.

It cannot be said that in California, an indigent appellant will get a less thorough and comprehensive re-

view than an appellant of means. In the case of the appellant with a retained counsel, a reviewing court may justifiably rely on the work of private counsel. The court may telescopically review the record with their judicial eyes trained only on the points urged by this hired counsel. Due to the press of constant appellate litigation and such reliance on the diligence of the hired counsel, the appellate court may overlook points of merit not raised by that counsel. However, when faced with the case of the indigent appellant, the reviewing court will search the complete trial record (which California has prepared for that indigent at no expense to him) thoroughly and carefully with the knowledge that they are dealing with an appellant bereft of money and counsel. This reviewing court will be using the eyes of an experienced appellate justice who has honed his judicial vision on thousands of transcripts of all types and sizes.

These justices will not be reviewing these records, as is often the case in court-appointed counsel, through the untrained eyes of the young, enthusiastic advocate whose lack of appellate experience leads him to eloquent efforts in a wholly frivolous case while he innocently informs the court of the total absence of merit in a case fraught with error. Nor will these justices be examining these records with the impatience of the busy practitioner who, irritated with his court appointment, skims over a record disclosing a coerced confession while his mind plays with the complexities of a coming will contest.

These justices will be reviewing these records through experienced eyes (*People v. Vigil*, 189 Cal. App. 2d 478, 480-482, 11 Cal. Rptr. 319), and with legal minds which have embraced a dimension of legal understanding that can only repose in the attorney who has ascended the appellate bench.

This Honorable Court places reliance on the cases of *Johnson v. United States*, 352 U. S. 565, 77 S. Ct. 550, 1 L. Ed. 2d 593, and *Ellis v. United States*, 356 U. S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060. (*Douglas v. California*, 31 L. Week 4281, 4282.) Respondent respectfully submits that those cases deal with the application by an indigent for leave to appeal *in forma pauperis* in attacking the certification of the Federal trial court that the desired appeal is not being pursued in good faith. *Johnson v. United States*, *supra*, held at page 551 (77 S. Ct. 550) that such an application "does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial."

Indeed, the California Appellate courts do not throw up such barriers for an indigent to overcome in order to secure a hearing on an appeal's merits. The justices on California's District Courts of Appeal are supplied with a complete record at no expense to the indigent and from this record, they review the lower court proceedings as to their actual merits, and not merely to determine whether or not the appeal is being pursued in good faith.

II.

**The Majority Opinion Fails to Pass on the Issue of Petitioner's Right to Separate Counsel at the Trial and Likewise Omits to Spell Out Necessary Limits in Requiring Appointment of Counsel on All Appeals for Indigents.**

There is a footnote observation in Justice Harlan's dissenting opinion to the effect that no improprieties occurred with respect to the representation of the two petitioners at trial.

> *Douglas v. California, supra*, 31 Law Week 4281, 4284.

However, the majority opinion is completely silent on this issue, although the majority of petitioner's and respondent's oral arguments at both the original argument and subsequent reargument of the instant case were, in fact, devoted to this issue.

In failing to make a finding on this issue, this Honorable Court may be asked to hear said trial counsel issue in the very near future due to the fact that said issue has been litigated already in the California District Court of Appeal and a hearing has been denied by the California Supreme Court.

> *People v. Douglas, supra*, 187 Cal. App. 2d 802, 813, 10 Cal. Rptr. 188.

Pursuant to this Honorable Court's opinion, the District Court of Appeal must appoint counsel for both petitioners on appeal, but said counsel will find that the only possible points to bring to the attention of

the appointing court have already been passed on by that court in its initial decision. Therefore, should this Honorable Court reject respondent's Argument under "Ground I," *supra*, it is submitted that they should nonetheless reconsider the feasibility of making a final determination of the issue with respect to petitioners' representation at the trial level of the instant case.

Lastly, the majority opinion of this Honorable Court sets out no minimal standard with respect to the appointment of counsel on appeal. Respondent has particular reference to a situation where the appellate court appoints counsel, and said counsel reports back that there is absolutely no basis for appeal. *People v. Mulvey*, *supra*, 190 Cal. App. 2d 714, 716-717. Must the appellate court insist that said counsel file a brief? Must they appoint another counsel? How much reliance can the appellate court place on an appointed counsel? Had the appellate court not re-examined the *Mulvey* case, *supra*, on its own motion after appointed counsel indicated the case was free of error, a substantial error would never have been corrected.

It is again respectfully submitted that if this Honorable Court rejects respondent's argument in "Ground I," *supra* it nonetheless should reconsider its decision from the standpoint of spelling out some guidelines upon which a state appellate court can rely in appointing counsel for the indigent appellant.

## Conclusion.

It is respectfully requested that this Honorable Court reconsider the observations in the dissenting opinions in the instant case, and that they examine the cases set out above which demonstrate that the California appellate courts do not prejudge cases at the time of deciding whether or not to appoint counsel; that an indigent appellant does not suffer on appeal because of that indigency; and that "any real chance he may have had of showing that his appeal has hidden merit" is not deprived an indigent merely because he is not represented by counsel. It is respectfully urged that this Honorable Court grant a rehearing in this matter in order that California's procedure for handling indigent appeals can be further considered in its true light. It is also respectfully requested that if this Honorable Court feels that their original decision on this point should stand, they nonetheless grant a rehearing for purposes of considering the issues of the trial representation of the petitioners and the matter of spelling out some basic guidelines for the appointment of counsel on appeal.

Respectfully submitted.

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*Attorneys for Respondent.*

## EXHIBIT "A".

### Opinion of the District Court of Appeal.

[Crim. No. 7805. Second Dist., Div. Three. Dec. 7, 1961.]

The People, Plaintiff and Respondent, v. James Monroe Rudolph, Defendant and Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Edward R. Brand, Judge. Affirmed in part and reversed in part.

Prosecution for assault with a deadly weapon and for armed robbery. Judgment of conviction affirmed as to assault count and reversed as to robbery count.

James Monroe Rudolph, in pro per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

The Court.— By one information James Monroe Rudolph was accused of assault with intent to commit murder, a second offense of burglary and a third offense of robbery, consisting of taking from the immediate presence of George C. Peterzon and James Stokes certain keys, by means of force and fear. By separate information, he was accused of grand theft. In each information he was accused of having served terms in prison after conviction of robbery, false imprisonment and kidnaping for the purpose of robbery and for a separate offense of robbery. The two informations were consolidated for trial. Defendant pleaded not guilty and admitted having served a term in prison for robbery, false imprisonment and kidnaping for the purpose of robbery and a separate term

after conviction of robbery. In a jury trial defendant was represented by the public defender. By separate verdicts defendant was found guilty of assault with a deadly weapon, burglary and robbery and it was found that at the time of the burglary and at the time of the robbery defendant was armed. He made a motion for new trial, which was granted with respect to the conviction of burglary and denied as to the convictions of assault with a deadly weapon and robbery. The count charging burglary was dismissed. In propria persona, defendant appealed from the judgment and the order denying his motion for a new trial. He applied for appointment of counsel on the appeal; we denied the application after reading the record and determining that the appeal is groundless as to one conviction and clearly meritorious as to the other, as will hereinafter appear. Defendant was given notice, and time to file a brief and has filed none.

We have examined the instructions that were given and those that were refused and find that the jury was correctly and adequately instructed. In reply to our inquiry of the deputy public defender who represented defendant, we have been advised that there were no improper statements made by the district attorney in arguments to the jury.

There was evidence of the following facts. On December 5, 1960, the Scandia Restaurant at 9040 Sunset Boulevard in Los Angeles, was closed for business. At about 2:15 p.m., George C. Peterzon, executive chef, entered the restaurant through a cellar door and admitted another employee, James Stokes, a pot washer. They went into Peterzon's office. Both Peterzon and

Stokes testified that they observed a man coming down the stairway toward the office. The man was wearing a hat and his face was partly covered by a handkerchief. When he was about 10 feet away from them he pointed a gun at them. Peterzon stopped back into the office and closed the door. Stokes testified that the man told Peterzon to open the door or he would shoot him (Stokes); Peterzon opened the door and Stokes stepped inside; Peterzon asked, "What do you want?" and the man said "Stay still or I will shoot," whereupon he fired a shot. He ordered them to lie on the floor and they both lay face down. The man asked where the safe was and was told there was no safe in the office; he asked where the money was, saying, "There got to be some money around here"; he was told that the money was banked every night. The man looked around, pulled cabinets open, and pulled loose the telephone wires; he found some keys which he handled. He disappeared up the stairs, but returned soon and looked around some more, after which he left and did not return. After waiting some time, Peterzon and Stokes got off the floor. Peterzon then observed for the first time blood on his clothing and discovered that he had been shot in the leg. Peterzon got into his car and drove to the sheriff's office.

Harold Vincent Hall, a police officer, testified that at about 1:50 a.m. on the morning of December 10 he and his partner were alerted by a silent burglary alarm coming from 3350 Wilshire Boulevard. They went to the location; Hall's partner remained at the front of the establishment; Hall went to the rear driveway; Hall heard two shots and running around the corner saw his partner had just fired two shots at a man

running across the street and between two houses; pursuing him he overtook him in a nearby garage where he was found hiding against the wall; he was arrested; a flashlight and a screwdriver were taken from him. The suspect wrestled his right arm free as the officers were placing on handcuffs, grabbed his gun and fired a shot, which went through his foot. A revolver was taken from him. The gun was produced at the trial and was admitted by defendant to be one that he had purchased from an ex-convict in Sacramento for $20 or $25.

Robert E. Carroll, a deputy sheriff, testified that a bullet that was shown him in court had been retrieved from the floor in the lower kitchen of the Scandia Restaurant about 3:30 p.m. on December 5. It was photographed while held in his hand, was taken to the station and placed in the evidence locker.

Howard F. Gavin, an expert in forensic ballistics, testified that he fired seven shots from the gun that had been taken from defendant. Three of the bullets were compared with the bullet that had been retrieved by Deputy Carroll. They had all been fired from the same gun. Under examination and cross-examination he demonstrated that the identity of the bullets was proven by the striation pattern which fell into line and was similar in all respects. There was no other expert evidence on this subject.

Defendant testified that when he bought the gun, in September, it contained six loads, one of which was fired accidentally during his arrest. He denied having ever been in the Scandia Restaurant and any knowledge of any offense committed there.

Both Peterzon and Stokes were shown photographs of arrestees and later looked at several of them in a police line-up. Peterzon could not identify the defendant; Stokes testified that he did pick out the defendant as the one whom he encountered in the restaurant. Defendant testified that at that time while he could not see Stokes he heard him say "I have never seen any of those men before." In his cross-examination defendant admitted three former felony convictions.

At the time of defendant's motion for a new trial and a hearing on an application for probation it was stated by defendant's attorney that defendant was presently serving a sentence of life imprisonment for a violation of section 209, Penal Code. Defendant was sentenced on his convictions of assault with a deadly weapon and robbery, the latter offense consisting of the alleged taking of keys from Peterzon and Stokes and from their immediate presence.

In the line-up at the jail Peterzon was unable to identify the defendant. The testimony of Stokes as to his identification was unconvincing. He apparently had no opportunity to observe the features of defendant during the commission of the offense. However, the expert testimony left no doubt as to the identity of defendant as the one who committed the assault.

Mr. Gavin was shown by study and experience to be well qualified as an expert in forensic ballistics. He had testified as such in cases running into the hundreds. He testified as follows: "When the rifling grooves are cut into a weapon, the tooling of this rifling causes minute lines or striae, which is unique to that particular weapon which is being worked on, because

the tool itself receives wear, and there is differences in the metal in which the rifling is being cut, and this makes the pattern for that particular barrel to be unique and like no other barrel." In his experience he had never found two guns with the same striation patterns. The bullets which he had compared were received in evidence. He was subjected to vigorous cross-examination. The conclusions he expressed were convincing evidence that the bullet which struck Peterzon was fired from defendant's gun, which he stated had never been in the possession of any one else while he owned it. His guilt of assault with a deadly weapon was proved by the strongest sort of evidence.

We are of the opinion, however, that there was insufficient evidence to prove that defendant was guilty of robbery in taking keys from the immediate presence of Peterzon and Stokes as alleged in the information.

Peterzon testified as follows: "Q. After the man came in the second time, what did he do after he was in there for awhile? I believe you stated he took some keys? A. The first time he took the keys to go upstairs to get in—I understand he had been up—Mr. Crigger: (interrupting) I move to strike what he planned to do. The Court: Strike it out. Q. By Mr. Bain: Did you see him take the keys? A. I heard him take the keys. Q. Did you see where they were later on? A. No. Q. Later on, did you look at the spot where the keys had been? Did you notice later that some keys were missing? A. I don't know if they were missing. I heard him have them in his hand, about three or four of them." On cross-examination, he testified: "Q. Did you actually see, with your

eyes, any keys being taken by that man? A. No, but the keys are hanging on a rack, and you can hear it. Q. In other words, you didn't see any keys being taken, but you heard a noise which to you sounded like keys rattling, is that right? A. Yes, sir. Q. How many keys do they have on the place where the keys were taken from? A. Approximately 30-40. Q. And you did not find any keys missing sometime later? A. I didn't look for it. Q. You don't know, do you, whether the man, when he came in, had any keys with him in his possession, when he came to the stairway? A. No. All he had was a handkerchief in one hand and a gun in the other. . . . Q. After this happened, you didn't check the keyboard, or whatever it was, to see whether there were any missing? A. No, I went right down to the Sheriff's station. . . . Q. And the keys which you heard rattling, or the noise that sounded to you like keys, did that happen right after you went into the office and laid down? A. No, it was after he looked around, and I suppose he saw the keys hanging on the rack, and he started fooling around with them to find something. . . . Q. When he left the office did you check the keys? A. No, I couldn't check the keys. He took the keys and went out of the office and came back in again."

Stokes testified: "Q. Before he left the first time, did he take something with him? A. Yes, he took some keys. Q. Did you see him take the keys? A. No, I know they were rattling— Q. What? A. The keys were rattling. . . . Q. After you laid down on your stomach in the office, did you look at him at any time then while you were lying there? A. No, I didn't. Q. Did you ever see that man take

any keys from that office? A. All I heard was the rattling from the keys. Q. Just the rattling noise that indicated to you some keys were being moved by somebody? A. Yes."

Whatever Peterzon and Stokes heard which they identified as the rattling of keys was while they were lying face down on the floor. At no time did they see defendant or observe his movements. While they assumed that he left the room carrying some of the keys, that was merely a conclusion from the fact that they heard what they believed to be the rattling of the keys. They merely supposed that he took the keys with him when he left the room. There was no evidence that any doors had been opened by the use of keys nor was there any evidence that any keys were missing. It was unlikely that if defendant took any keys from the board he would have returned them. However strong the suspicion may be that defendant carried away keys from the immediate presence of Peterzon and Stokes, the facts in evidence fall short of proof that he was guilty of robbery.

The judgment and motion for new trial with respect to the conviction of assault with a deadly weapon are affirmed; as to count III of the information charging robbery, the judgment and order are reversed.

## EXHIBIT "B".

### Opinion of the District Court of Appeal.

[Crim. No. 5092. Second Dist., Div. Three. Oct. 22, 1956.]

The People, Respondent, v. Robert Donald Hamm, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. LeRoy Dawson, Judge. Reversed with directions.

Prosecution for illegal possession of heroin. Judgment of conviction reversed with directions.

Robert Donald Hamm, in pro. per., for Appellant.

No appearance for Respondent.

Shinn, P. J.—Robert Donald Hamm was charged with the wilful, unlawful and felonious possession of a preparation of heroin (Health & Saf. Code, § 11500), and with a prior felony conviction, to wit, attempted robbery. Defendant denied the former conviction. Trial was to the court and the evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. Defendant was represented by counsel. The court found defendant guilty and also found the charge of prior conviction to be true. He appeals from the judgment and an order denying him a new trial.

There was evidence of the following facts: At about 7:30 p.m. on March 1, 1956, plain-clothes officers White and Northrup were driving northward in an unmarked car on Towne Avenue in the city of Los An-

geles. Officer White testified that it was dark and that the only artificial lighting came from the car headlights. He observed defendant and one Rollins walking southward on Towne. Defendant was nearest the curb. His attention was directed to the men by defendant's apparent nervousness. As the car approached, White saw defendant make a backhand flipping motion with his right hand and noticed a light object leave his hand. Rollins did not make a throwing motion. White got out of the car and discovered a cellophane bindle lying on the parking strip in the dirt next to the curb. The bindle was beside a parked car about three feet from where defendant was standing when he threw it. Both men's arms were examined; old needle marks were found on Rollins' arms; none was found on defendant. Officer White placed the bindle in an envelope, sealed it and sent it to the central property police officer where it was examined the next day by Jay Allen, a police chemist. Allen testified that he opened the envelope and found it to contain seven paper bindles, each one holding a quantity of powder. He analyzed the powder and determined it to be heroin.

Defendant, testifying in his own behalf, stated that while he and Rollins were walking southward on Towne Avenue, they were stopped by two plain-clothes policemen. The officers asked him if he was a narcotics user. He told them he had been but had quit it. The officers then examined both men for needle marks. They found none on defendant, but one of the officers accused defendant of being under the influence of narcotics. The officers were about to let them go when one suggested that defendant and Rollins might have

dropped something. The officer searched the area with a flashlight and discovered a small package by the curb. Defendant denied that either he or Rollins had thrown the package away. On cross-examination, he admitted the prior conviction, but it was conceded that he had not served a term in prison.

Lovell Rollins, testifying on behalf of defendant, admitted being a narcotics user, but stated that defendant did not have the heroin in his possession.

Upon application of defendant for appointment of counsel, this court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals. The record on appeal was examined by a member of the committee and a report was made to the court that in the attorney's opinion no meritorious ground for appeal existed and that the filing of a brief would be unjustified. Defendant was duly so advised and his time to file a brief was substantially extended. No brief has been filed. In accordance with our practice, we have made an independent study of the record. (See *People v. Logan*, 137 Cal.App.2d 331 [290 P.2d 11].)

The evidence supports the judgment. There was testimony justifying a reasonable inference that Hamm had actual dominion and control over the heroin, and his knowledge that the package was contraband, was sufficiently shown by his attempt to dispose of it when he feared apprehension. (*People v. Tennyson*, 127 Cal. App.2d 243 [273 P.2d 593] and cases cited.)

The People produced no evidence of defendant's former conviction. He was questioned on cross-examination as follows: "Q. Have you ever been convicted

of a felony, sir? A. Yes, sir, I have. Q. What felony? A. Robbery. Q. Really it was attempted robbery, wasn't it? A. Yes, sir. Q. Rather than robbery? A. Yes. Q. You never served a term in the Federal or State prison for it? A. No, sir." This admission of a former conviction was relevant only to the matter of defendant's credibility and was available to the People for the purpose of impeachment only. (*People v. Carrow*, 207 Cal. 366, 368-369 [278 P. 857]; *People v. Batwin*, 120 Cal.App.2d 825, 828 [262 P.2d 88].) The adjudication that defendant had suffered a prior conviction was without support in the evidence.

The judgment and order are reversed and the cause remanded to the trial court with direction to that court that if, within 20 days after the filing therein of the remittitur from this court, the district attorney shall apply for an order dismissing that portion of the information which charges defendant with having been convicted of a felony prior to the commission of the offense under section 11500 of the Health and Safety Code charged therein, and said application be granted, and the court shall pronounce judgment and sentence upon defendant, thereupon such judgment shall stand affirmed. If the district attorney shall not within said period of 20 days make said application, the trial court shall grant appellant a new trial as to the accusation of the former conviction only.

Wood (Parker), J., and Vallée, J., concurred.

On October 23, 1956, the opinion and judgment were modified to read as printed above.